Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ROY LEE BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Texas

PETITION FOR WRIT OF CERTIORARI

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September 13, 2001

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QUESTION PRESENTED

ISSUE NO. ONE: The evidence is legally insufficient to sustain the conviction herein.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Roy Lee Brown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas denying the relief requested in the Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of the State of Texas is unpublished but appears in Appendix A to this petition as *Roy Lee Brown v. State of Texas*, #0591-01 (Court of Criminal Appeals, June 20, 2001).

The opinion of the Court of Appeals for the Sixth Appellate District of the State of Texas, is unpublished but appears in Appendix B to this petition as *Roy Lee Brown v. State of Texas*, #06-00-00126-CR (Court of Appeals, Texarkana, Texas, March 9, 2001).

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on June 20, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1257, and pursuant to the U.S. Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions relating to legal evidentiary sufficiency are the bases of the complaints herein, as well as case law relating thereto.

STATEMENT OF THE CASE

The Court of Appeals, Sixth Appellate District of Texas at Texarkana, had jurisdiction pursuant to Rule 25.2, Texas Rules of Appellate Procedure. The Court of Criminal Appeals of the State of Texas had jurisdiction pursuant to Rule 66, Texas Rules of Appellate Procedure.

This is a petition for writ of certiorari following a request for the Texas Court of Criminal Appeals for the State of Texas, the court of last resort for criminal cases, following direct appeal to the Court of Appeals, Sixth Appellate District of Texas at Texarkana, from a conviction of aggravated assault. Appellant was indicted by a Jefferson County grand jury for the offense of aggravated assault. (C.R.-2.). Appellant pled not guilty, and trial was to a jury. (R.R. III-1).

Following an opening statement, the State began by calling Sheila Broussard, the victim's sister. (R.R. III-9). Broussard testified that she knew appellant because he had previously dated her sister. (R.R. III-10). On June 4, 1998, Broussard was driving near her sister's house when she was flagged down by a man who said her sister had been rushed to the hospital. (R.R. III-11). She further testified that she felt the relationship between appellant

and her sister was not "healthy" because they always fought. (R.R. III-13).

The State next called the alleged victim, Janice Savoy. (R.R. III-15). Savoy testified that in June of 1998, she lived with appellant. (R.R. III-16-17). On June 4, Savoy had just returned home when appellant got home. (R.R. III-17). Savoy asked appellant to give her the keys to her home and to leave when appellant allegedly "jumped" on her. (R.R. III-17). Savoy was angry with appellant because they had made plans and he had "stood her up." (R.R. III-18). Appellant had been working on his sister's roof, and returned home at 11:00 that evening. (R.R. III-19). Savoy asked appellant to leave her house because she was tired of him lying to her. (R.R. III-19). Savoy also admitted that she was on felony probation for a controlled substance offense. (R.R. III-21).

Savoy wanted to remove the air conditioner from the window, so that appellant could not have the benefit of it, and went to get a hammer to remove it. (R.R. III-22). As Savoy was attempting to remove the air conditioner, appellant allegedly took the hammer and attempted to hit her with it, all while attempting to choke her. (R.R. III-22). Appellant allegedly hit Savoy with his fists all over her face. (R.R. III-23). Savoy testified that she "blanked out" until appellant released his hand from her neck, when she took a breath and "just woke up" and ran out of the house. (R.R. III-24). When she left the house, appellant allegedly followed her. (R.R. III-26). Savoy testified she was in the hospital for four days with a broken nose and 17 stitches above her right eye. (R.R. III-26).

On cross examination, Savoy admitted that she and appellant had previously fought, and that she has pulled a knife on appellant and injured him. (R.R. III-28). On the night of the alleged incident, Savoy testified that she had consumed two beers, but did not know why her medical records showed that she tested positive for cocaine. (R.R. III-29). Savoy further testified that she had seen appellant "off and on" since the incident, and that she had spent the night at his residence since the alleged attack. (R.R. III-31). She further testified that the last time she had spent the night at appellant's residence was about three days prior to the trial herein. (R.R. III-31).

The State next called James Cooper. (R.R. III-42). Cooper testified that he knew Savoy because they previously lived in the same neighborhood. (R.R. III-43). On the night of the alleged attack, Savoy ran to Cooper's house and woke him up. (R.R. III-44). Cooper called 911 and saw that both of Savoy's eyes were swollen, her lips were swollen, and blood was running down both sides of her face. (R.R. III-45). Whereupon the State rested. (R.R. III-49).

Appellant began by testifying in his own behalf. (R.R. III-50). Appellant testified that on June 4, 1998, he was at Savoy's house playing dominoes with some friends. (R.R. III-50). He had been babysitting Savoy's son. (R.R. III-51). Savoy's son left the house, and appellant found him at his aunt's house. (R.R. III-53). Appellant then went back to Savoy's house and went to sleep about 7:00. (R.R. III-53). Appellant then woke up to find Savoy standing over him with a hammer telling him to get up and get out. (R.R. III-54). Fearing Savoy was going to strike appellant with the hammer, he rose from the mattress and struck Savoy.

(R.R. III-55). Savoy never passed out, and appellant never choked her. (R.R. III-56). Appellant was never contacted by the police concerning the alleged incident. (R.R. III-57). Whereupon appellant rested. (R.R. III-71).

In rebuttal, the State called Trina McPike, a Beaumont police officer. (R.R. III-71). McPike testified that on February 5, 1998, she was dispatched to a disturbance on East Simmons Street. (R.R. III-72). When she arrived, she observed a black female sitting on the porch of the residence, bleeding profusely. (R.R. III-72). McPike called for an ambulance and had Savoy taken to the hospital. (R.R. III-73). Savoy told her that she had been attacked by her estranged husband, that he had attacked her and struck her with his fists, a box, and any other item he could find in the room. (R.R. III-73-78). Whereupon the State rested in rebuttal. (R.R. III-82).

Following arguments of counsel and deliberations, the jury found appellant guilty of the offense of aggravated assault as alleged in the indictment. (R.R. III-104). Following the presentation of punishment testimony, and after further arguments of counsel and deliberations, the jury assessed punishment at incarceration in the Institutional Division of the Texas Department of Criminal Justice for a term of four years. (R.R. IV-33). From said conviction and sentence, appellant timely perfected Notice of Appeal to the Court of Appeals, complaining of the points of error as occurring in the trial on the merits. Petitioner Brown timely filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals. Any

relief on said issues was denied by the Court of Appeals and the Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that the Sixth Court of Appeals has affirmatively, and, by implication the Texas Court of Criminal Appeals, have decided important questions of federal law which has not been, but should be, settled by this Court, and has, in effect, rendered a decision that conflicts with applicable decisions of this Court.

As detailed in the Brief for Appellant on file before the Court of Appeals, petitioner submits that the Court of Appeals erroneously failed to grant the relief to which petitioner is entitled on the following issues:

> ISSUE NO. ONE: The evidence is legally insufficient to sustain the conviction herein.

In conducting a legal sufficiency review, the appellate court must view all the relevant evidence in the light most favorable to the guilty verdict, and determine whether any rational trier of fact could have found all of the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Mason v. State*, 905 S.W. 2d 570 (Tex. Crim. App. 1995). Reviewing all of the evidence in the case at bar in the light most favorable to the guilty verdict leads to the inescapable conclusion that the evidence is legally insufficient. In order for the conviction to be sufficient, there must be some facts adduced from which a jury could reasonably infer the guilt of the accused. *U.S. v. Villasenor*, 894 F.2d 1422 (5th Cir. 1990).

Appellant was charged by an amended indictment with the offense of aggravated assault, by causing serious bodily injury by hitting the complainant with his hand. Serious bodily injury was defined by the Court as " . . . bodily injury that creates a substantial risk of death, or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." The State presented no evidence, however, to show appellant caused serious bodily injury.

The medical records offered into evidence by the State showed that the complainant had facial swelling, a small laceration above her right eyebrow, and a possible concussion. The records also showed the complainant had been consuming beer, and tested positive for cocaine. There was nothing offered to show that there was any risk of death whatsoever, much less a substantial risk. Furthermore, there was nothing to show any type of disfigurement, permanent or otherwise, and there was no loss or impairment of the function of any bodily member or organ. Much ado was made during testimony of the complainant's swollen eyes, but the medical records show that there was no injury to the complainant's eyes, and that the complainant's eyesight was fine.

For the purposes of the discussion here, the question is not whether appellant caused some injury to the complainant, but whether he caused serious injury to the complainant. Appellant admitted that he struck the complainant in self-defense. He struck her until she dropped the weapon she was holding. It is clear that appellant caused injury to the complainant. Even viewing the evidence in the light most favorable to the guilty verdict,

however, does not show appellant caused serious bodily injury. It is clear that the conviction is based upon the jury's sympathies for the complainant. This is why the state called Officer McPike to testify in rebuttal. McPike could not provide any information as to whether appellant committed this offense or not. She was not present. The only benefit of having McPike testify was to inflame the jury's mind, to "wave the bloody clothes" in front of the jury. It was clear that the state could not win on the facts, as they are insufficient. Therefore, they must win on sympathy.

There is nothing to show appellant caused "serious bodily injury" to the complainant. As the evidence presented is insufficient to show serious bodily injury, appellant urges this Honorable Court to sustain this point of error.

The paucity of evidence leads to the inescapable conclusion that appellant was convicted only upon the discredited testimony of an admitted drug dealer. Petitioner contends that the facts adduced at trial, as detailed in the Statement of Facts herein, fail to establish beyond a reasonable doubt that appellant committed the offense of aggravated assault as alleged. To hold that a reasonable jury could have concluded beyond a reasonable doubt that Petitioner committed the offense of aggravated assault is to strain the bounds of reason. It was therefore incumbent upon the appellate court to reverse the conviction and enter a judgment of acquittal. *Burks v. U.S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals in this case.

DATED: September 13, 2001.

Respectfully submitted,

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APPENDIX A

(LOGO)

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-00-00126-CR

ROY LEE BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd Criminal District Court
Jefferson County, Texas
Trial Court No. 76852

(Filed Mar. 9, 2001)

Before Cornelius, C.J., Grant and Ross, JJ.
Opinion by Chief Justice Cornelius

OPINION

Roy Lee Brown was convicted of aggravated assault. He was convicted by a jury, which set his punishment at four years' confinement. Brown was accused of assaulting his girlfriend, Janet Savoy. On appeal, Brown contends that fundamental error occurred when the prosecutor engaged in improper jury argument. He also challenges the legal and factual sufficiency of the evidence.

In his first issue on appeal, Brown contends that fundamental error occurred when the prosecutor engaged in improper jury argument. At the end of his closing argument, the prosecutor made the following statements:

> So, that's it. That's the facts. Moving away from the facts, you all are the community here; and you-all have the last say. It's now passed from the police department, to me, to you. We talked about this type of violence yesterday and how each of us feel about it. We all had – most of you had similar opinions. There may have been some different opinions. My opinion doesn't matter but I submit to you it's very serious, a very serious beating and it's your responsibility now to go back there and look at the evidence. It's clear. *I hope you will do it quickly so we can get on to more important things like the second phase of this trial, the punishment.*
>
> I do appreciate your time and your attention. All of this evidence is available for you should you have any questions. You just have to ask the bailiff for it. Okay? Thank you very much for your time, and *I hope we'll be talking to you in a little while about punishment.* Thank you.

(Emphasis added.)

Proper jury argument must fall within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement. *Wesbrook v. State,* 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Even when an argument exceeds the permissible bounds of these approved areas, there is no reversible

error unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding. *Id.* The remarks must have been a willful and calculated effort on the part of the State to deprive the appellant of a fair and impartial trial. *Id.*

Brown cites *Cherry v. State*, 507 S.W.2d 549, 549 (Tex. Crim. App. 1974), in which the prosecutor made the following statements during his closing argument:

> I beleve [sic] that y'all know that the real reason we tried this case was not to determine guilt or innocence, but to determine what kind of punishment that is going to be set on this particular kind of crime.

The defendant's objection was overruled. The Texas Court of Criminal Appeals held that the argument was improper, the harmfulness of which was compounded by the fact that the remark was the last statement made to the jury before its deliberations. The court rejected the State's contention that the argument was a legitimate plea for law enforcement.

Brown also cites *Kelly v. State*, 903 S.W.2d 809, 810 (Tex. App. – Dallas 1995, pet. ref'd), in which the prosecutor argued:

> I don't want to waste any more time in this phase of trial. I think what you need to do now is just go back there, apply the evidence to law and find him guilty, and let's get on to what really is the issue in this case, what punishment should be assessed.

The trial court overruled the defendant's objection and motion for mistrial. Citing *Cherry*, the court of appeals concluded the argument was improper and the error was reversible.

The State contends that Brown's failure to object waives any error on appeal. Brown responds that the argument was so prejudicial that any instruction to disregard would not have cured the harm, citing *Montoya v. State*, 744 S.W.2d 15 (Tex. Crim. App. 1987), and *Romo v. State*, 631 S.W.2d 504 (Tex. Crim. App. [Panel Op.] 1982). As the State observes, *Montoya* and *Romo* were both expressly overruled in *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). In *Cockrell*, the court stated:

> Before a defendant will be permitted to complain on appeal about an erroneous jury argument or that an instruction to disregard could not have cured an erroneous jury argument, he will have to show he objected and pursued his objection to an adverse ruling.

Id. Therefore, Brown has waived this issue for appeal.

In his second issue on appeal, Brown challenges the legal sufficiency of the evidence. In reviewing the legal sufficiency of evidence, we determine whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Lane v. State*, 933 S.W.2d 504, 507 (Tex. Crim. App. 1996). We must evaluate all of the evidence in the record, both direct and circumstantial, whether admissible or inadmissible. *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993).

Based on the indictment, the State was required to prove that Brown (1) intentionally, knowingly, or recklessly, (2) caused serious bodily injury to Savoy. *See* TEX. PEN. CODE ANN. § 22.02(a)(1) (Vernon 1994). Serious bodily injury is defined as bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. TEX. PEN. CODE ANN. § 1.07(a)(46) (Vernon 1994). Brown contends the State failed to prove that he inflicted serious bodily injury on Savoy.

The medical records admitted into evidence at the trial reveal that Savoy suffered severe facial swelling, a concussion followed by post-concussion syndrome, a broken nose with a tender and deformed bridge, an air pocket around and behind her left eye, a five-centimeter laceration to her forehead, bruising to her neck, nausea, and dizziness. Savoy testified that the cut to her forehead required seventeen stitches, that her vision was significantly impaired for about two or three weeks by the swelling around her eyes, and that she was hospitalized for four days. Further, she testified that she blacked out as Brown choked her. In addition, James Cooper, whose house Savoy fled to, and Officer Trina McPike, who responded at the scene, testified that Savoy was bleeding heavily, was close to unconscious, and was heavily bruised. There is direct testimony that Brown intentionally inflicted these injuries on Savoy.

Because the Texas Penal Code provides different definitions for "bodily injury" and "serious bodily injury," we must presume the Legislature intended there to be a meaningful difference between the terms. *Moore v. State*,

739 S.W.2d 347, 349 (Tex. Crim. App. 1987). Therefore, the issue of whether the victim of an assault sustains serious bodily injury must be determined on an ad hoc basis.

In *Moore*, the leading case on the proof required to establish serious bodily injury, a plurality of the Texas Court of Criminal Appeals held the evidence insufficient where the victim was stabbed in the back and cut on his nose, but was able to leave the scene on his own power and did not discover his injuries until much later. *Moore v. State*, 739 S.W.2d at 349. There was also testimony that the victim bled, was treated and released at the hospital, was in pain for several days, and sustained a minor scar on his back.

The court concluded that testimony that the victim was bedridden for a week did not establish that he suffered a loss or impairment of function that was protracted. The court further concluded that the State failed to meet its burden of establishing that the injury was life threatening; i.e., that it was so serious that it differed in kind, and not merely in degree, from other bodily harm.

The State cites *Brown v. State*, 605 S.W.2d 572 (Tex. Crim. App. [Panel Op.] 1980), *overruled on other grounds, Hedicke v. State*, 779 S.W.2d 837 (Tex. Crim. App. 1989), in arguing that the jury could have concluded that because Savoy's broken nose had a tender and deformed bridge, her nose was disfigured or impaired. In *Brown*, the victim's nose was also broken and deformed, but was later set in place, preventing its disfigurement and dysfunction. *Brown v. State*, 605 S.W.2d at 575. The court held that

the setting of the bone did not make the evidence insufficient, because the determining fact is the impairing quality of the injury at the time it was inflicted, not after the effects had been ameliorated or exacerbated by other matters such as medical treatment.

In *Webb v. State*, 801 S.W.2d 529, 531 (Tex. Crim. App. 1990), the victim needed surgery to repair a broken bone in his face. The Court of Criminal Appeals distinguished *Brown* on the basis that in *Webb* there was no evidence that the injury, without the surgery, would have caused permanent disfigurement or protracted loss or impairment of function of any bodily member.

Here, there is no evidence that the deformed bridge was related to Savoy's injuries and was not a pre-existing deformity. Even if the record supported such an inference, there was no evidence that the deformity was either serious or permanent. Thus, we conclude that no rational jury could have concluded beyond a reasonable doubt that Savoy's deformed bridge constituted a serious bodily injury.

Nevertheless, the jury could have concluded beyond a reasonable doubt that Savoy suffered a protracted impairment of her vision. She testified that her vision was significantly impaired for about two or three weeks. The present case is therefore unlike *Webb*, in which the court determined that the State failed to show the severity of the injury or that it had any continuing effects. *Webb v. State*, 801 S.W.2d at 532. Nor is the present case like *Williams v. State*, 696 S.W.2d 896, 897-98 (Tex. Crim. App. 1985), in which the victim was shot, but was able to flee on foot, walk to his car, drive to a nearby corner, flag

down a police officer, and return to the scene with the officer.

In his third issue on appeal, Brown contends the evidence is factually insufficient to convict him. Under a factual sufficiency analysis, we examine whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 9 (Tex. Crim. App. 2000); *see also Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Accordingly, we will reverse the fact finder's determination only to remedy a manifest injustice. *Johnson v. State*, 23 S.W.3d at 12. We must give due deference to the fact finder's determinations concerning the weight and credibility of the evidence.

The evidence showed that Brown and Savoy maintained separate residences, but often stayed together. Savoy testified that she returned home one evening angry at Brown for "standing her up" that day on plans they had made. She testified that, instead, he was at his sister's house working on a roof, but that he did not return home after leaving there. She looked around town for him, but returned every thirty minutes to check if he had returned. She said he returned home around 11:00 p.m.

When Savoy returned, she woke Brown and told him to get out of her house and leave his keys. She testified that she got a hammer to remove the air conditioner from the window because she did not want him to have the use of her air conditioner. At this point, she testified, Brown

jumped on her, beat her with his fists about seven or eight times, and choked her with his hands. Savoy testified that she was eventually able to break away and run to Cooper's house for help.

On cross-examination, Savoy admitted to a history of fights with Brown during their relationship. She admitted to hitting him and cutting him with a knife, but asserted that she acted in self-defense. She also admitted that she was on community supervision for a drug-related offense. She further admitted to drinking beer on the night of the assault and to testing positive for cocaine. She also admitted to seeing Brown on and off after the assault, even staying at his house one night and letting him stay at her house on another night.

Brown contradicted Savoy's version of the events in several important details. He denied that he made plans with Savoy or that he was working on his sister's roof. He testified that he was at Savoy's house playing dominoes with friends until about 6:00 p.m. He drove over to Savoy's sister's house to look for Savoy's son, who Brown was supposed to be watching. He found both Savoy and her son there. He then returned to Savoy's house around 7:00 p.m. and went to sleep.

Brown testified he awoke around 1:30 a.m. to see Savoy standing over him with a hammer in her hand. She told him to, "Get up and get out." He testified that Savoy was angry with him for not keeping her son at her house. He testified that as he was getting up, she raised the hammer back, so he hit her as hard as he could. He testified that though she was dazed, she was still charging at him with the hammer. He hit her two more times

until she dropped the hammer. He testified that Savoy fled, and he left and went to his own house. He said he acted out of fear that she would hit him with the hammer because she had stabbed him with a knife sometime previously.

Brown contends that Savoy's account of the events lacked credibility to such an extent that the jury's decision to believe her is contrary to the overwhelming weight of the evidence. However, Brown admitted to hitting Savoy, and the evidence showed she sustained serious bodily injuries. Thus, Brown's complaint is really about the factual sufficiency of the evidence supporting the jury's verdict on his claim of self-defense, about which the trial court charged the jury.

A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. TEX. PEN. CODE ANN. § 9.31(a) (Vernon Supp. 2001). A person's right of self-defense is not absolute. The person must believe that force is immediately necessary to protect himself against unlawful force. The person's belief that force is immediately necessary must be reasonable. The person's belief about the degree of force immediately necessary must be reasonable.

If the trial court submits the issue of self-defense to the jury, the court must charge that a reasonable doubt on the issue requires the jury to acquit the defendant.[1] TEX.

---

[1] The trial court instructed the jury on the law of self-defense, but failed to apply the law of self-defense to the facts

PEN. CODE ANN. § 2.03(d) (Vernon 1994); *Muhammad v. State*, 911 S.W.2d 823, 828 (Tex. App. – Texarkana 1995, no pet.). Though self-defense is an absolute defense to prosecution and requires the State to disprove its existence beyond a reasonable doubt, we use the same standard of review as we would to conduct any factual sufficiency analysis. *Manuel v. State*, 981 S.W.2d 65, 68 (Tex. App. – Fort Worth 1998), *aff'd*, 994 S.W.2d 658 (Tex. Crim. App. 1999); *Griffith v. State*, 976 S.W.2d 686, 690-91 (Tex. App. – Tyler 1997, pet. ref'd); *Wilkerson v. State*, 920 S.W.2d 404, 407 (Tex. App. – Houston [1st Dist.] 1996, no pet.).

The jury's verdict is supported by factually sufficient evidence. Brown contends the jury should have believed his testimony over Savoy's. Brown testified that he awoke and saw Savoy wielding a hammer, so in self-defense he hit her three times until she dropped the hammer. Yet the jury could have believed Brown's testimony and still found against him on the issue of self-defense.

First, the jury could have decided that Brown's belief that force was immediately necessary was unreasonable. By his own admission, Savoy woke him and told him to leave; she did not attack him while he was asleep. Second, the jury could have decided that Brown's belief about the degree of force immediately necessary was unreasonable. Brown testified that he is six feet two inches tall and weighs about 195 pounds; Savoy testified that she is five feet four inches tall and weighs about 125

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and did not instruct the jury that it must acquit Brown if it had a reasonable doubt on the issue of self-defense. Brown did not object to this defect at trial and does not raise the issue on appeal. Therefore, we do not address it.

pounds. The jury could have concluded that Brown did not need to hit Savoy at all, or that if he did, he did not need to hit her three times. In addition, based on the extent of Savoy's injuries, the jury could have disbelieved Brown's testimony that he hit Savoy only three times.

The judgment is affirmed.

/s/ William J. Cornelius
William J. Cornelius
Chief Justice

Date Submitted: March 8, 2001
Date Decided: March 9, 2001

Do Not Publish

APPENDIX B

[SEAL]

Court of Appeals
Sixth Appellate District of Texas

JUDGMENT

Roy Lee Brown, Appellant No. 06-00-00126-CR V. The State of Texas, Appellee	Appeal from the 252nd Criminal District Court of Jefferson County, Texas (Tr. Ct. No. 76852). Opinion delivered by Chief Justice Cornelius, Justices Grant and Ross participating.

BE IT REMEMBERED that, in accordance with the Court's opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it **ORDERED** that the judgment of the court below is in all things **AFFIRMED**.

It is further **ORDERED** that appellant, Roy Lee Brown, pay all costs incurred by reason of this appeal.

RENDERED MARCH 9, 2001
BY ORDER OF THE COURT
WILLIAM J. CORNELIUS
CHIEF JUSTICE

ATTEST:
Autumn Thomas, Clerk

APPENDIX C

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

June 20, 2001
COA#: 06-00-00126-CR
RE: Case No. 0591-01 JUN 20'01
STYLE: BROWN, ROY LEE

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.